In the Supreme Court of the United States.

No. 100.

October Term, 1904.

UNION STOCK YARDS COMPANY OF OMAHA, (LIMITED,) *Plaintiff in Error,* vs. CHICAGO, BURLINGTON & QUINCY RAILROAD CO., *Defendant in Error.*	**Petition for Rehearing**

To the Honorable,
The Supreme Court of the United States:

I have carefully examined the opinion of this Honorable Court, and think with propriety I may ask the Court to consider whether this case is not one in which it would be proper to grant a rehearing to the plaintiff in error, and I therefore respectfully petition the court to grant the plaintiff in error a rehearing for the following reasons, to-wit:

1. It is stated in the opinion that the question at issue is not to be complicated by the decision of the liability of the Railroad Company to the employee of the terminal company had the employee seen fit to bring the action against the Railroad Company alone or against both companies jointly.

I submit that that question must necessarily be de-

termined before the court should proceed to determine the question of whether the defendant in error was liable to the plaintiff in error. There certainly could exist no liability in favor of the plaintiff in error and against the defendant in error upon the facts certified unless the defendant in error was directly liable to the employee of the Terminal Company for the injuries he received through the use of the defective car. The right of the plaintiff in error to indemnity from the defendant in error is based upon the presumption that the defendant in error was primarily liable to the employee of the plaintiff in error. In every one of the cases cited where indemnity was allowed, the reason for allowing indemnity was that the one sued could have been made liable in the first instance for the damages which occurred.

It is further stated in the opinion that these cases for indemnity have their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in the city, because of defects in the streets or sidewalks caused by the negligence or active fault of the property owner. An examination of these cases will show that the judgment allowing indemnity was based upon the fact that had the person injured seen fit to have sued the party causing the defect he might have recovered.

I therefore submit to the Court that not only was the question at bar complicated by a decision of the liability of the Railroad Company to the employee of the plaintiff in error, but the decision of that question was absolutely necessary to a determination of the question at bar. The Court could not properly de-

termine the question at bar without first having decided whether defendant in error would have been liable to the employee of the plaintiff in error in a suit brought by the latter against the defendant in error.

The court, in the opinion in this case, has, also I think, wrongly assumed that there is such a diversity of opinion among courts as to the liability of the Railroad Company to the employee under such circumstances as is not justified upon an examination of the authorities. As a matter of fact, an examination of the authorities will disclose that all of the decisions except one, hold the liability to exist. That one case is the case of *M. K. & T. R. R. Co. vs. Merrill*, 70 Pac. Rep., 358. The force of that opinion is weakened from the fact that the court had in the same case on another appeal, held precisely the other way. A perusal of the first opinion will disclose that it is the more logical and reasonable. The only other case that can be suggested to stand with the Kansas case is the case of *Glynn vs. Central R. R. Co.*, 175 Mass., 510. But a reading of the opinion in the Massachusetts case will show that it did not appear in that case whether the delivering company had any interest whatever in the use to be made of the car, while in the case at bar the defendant in error had a direct interest in what was to be done with the car delivered by it to the plaintiff in error, and it had hired the plaintiff in error to do the very thing with the car that the plaintiff in error attempted to do. The liability of the defendant in error to the plaintiff in error should depend materially on what interest, if any, the defendant in error had in the use to be made of the car and the purposes for which it was delivered to the plaintiff in error, yet this fact is entirely overlooked in the opinion.

On the other hand, the great weight of authority upholds the right of the employee to recover of the defendant in error under the circumstances certified with the question. These cases are,—*Moon vs. Northern Pac. R. R. Co.; Penn. R. R. Co. vs. Snyder, Hoye vs. The Greet Northern R. R. Co.*, 120 Fed., and *Teale vs. American Mining Company*, cases directly in point and all cited in the brief filed on behalf of the plaintiff in error.

2. It is stated in the opinion that it may be conceded that the defendant in error, the Railroad Company, having a contract with the plaintiff in error, the Terminal Company, to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over to the Terminal Company in good order, and that a discharge of this duty required an inspection of the cars by the Railroad Company upon delivery to the Terminal Company.

I respectfully submit to the Court that if it is conceded that the defendant in error owed this duty to the plaintiff in error then the facts certified show that the defendant in error failed to discharge this duty that it owed to the plaintiff in error, and that it must necessarily be responsible for the result of such violation of its duty. If the duty to the plaintiff in error is conceded then a violation of that duty gave a cause of action in favor of the plaintiff in error if damages resulted from such violation of duty. The facts certified show that damages did result to the plaintiff in error from a failure of the defendant in error to perform this duty, which the opinion concedes existed. But it is said in the same connection that the plaintiff in error owed a similar duty to its employee and that it neglected to

perform this duty to the injury of the employee, and that this fact has been established by a decision of the Supreme Court of Nebraska.

It is to be inferred from this that the Court was of the opinion that because the plaintiff in error had been negligent in regard to a duty that it owed to its employee, that it therefore could not recover indemnity from the defendant in error.

I submit that this fact of negligence has appeared in every case where indemnity has been sought, and in no instance was it thought by any court that the fact that the plaintiff had to disclose that it had been negligent in the premises, was sufficient to prevent its recovery. If the fact that plaintiff's negligence in regard to a duty that it owed to somebody else would preclude recovery, then there would not have been recovery in any case cited in the brief or in the opinion.

In the case of *Brooklyn vs. Brooklyn City R. Co.*, cited in the opinion delivered in the case of the *Washington Gas Light Company vs. District of Columbia*, 161 U. S., 316, the following is quoted:

"Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators."

With reference to this, Justice White, who delivered the opinion in this court in that case, said:

"All the cases referred to involved only the right of a municipal corporation to recover over the amount of the damages for which it had been held liable in consequence of a defective street, occasioned by the neglect or failure of another to perform his

legal duty. The rule, however, is not predicated upon the peculiar or exceptional rights of municipal corporations. It is general in its nature. It has been applied to public piers. *Oceanic Steam Nav.Co. vs. Campania Trans-Atlantica Espanola*, 144 N. Y., 663; to the right of a property owner to recover for damages which he had been compelled to pay for a defective wire attached by a gas light company to the chimney of the owner's house, *Gray vs. Boston Gas Light Co.*, 114 Mass., 149; to the right of the master to recover over the damages which he had been obliged to pay in consequence of a servant's negligence, *Grand Trunk R. R. Co. vs. Latham*, 63 Me., 177; *Smith vs. Foran*, 43 Conn., 244. Indeed, the cases which illustrate the rule and its application to many conditions of fact, are too numerous for citation, and are collected in the text books. Wharton Negligence, 246; 2 Thompson on Negligence, 789, 1061; Sherm. & Redfield, Negligence, (4th Ed.), 301; 2 Dillon Municipal Corporations, 1035, and cases there referred to in note."

3. It is stated in the opinion that in the case at bar there is nothing in the facts as stated to show that any negligence or misconduct of the Railroad Company caused the defect in the car which resulted in the injury to the brakeman, and that the Railroad Company received the car from its owner, the Hammond Packing Company, and whether in good order or not the record does not disclose.

I submit that this fact was wholly immaterial, yet the opinion makes it important. These facts were wholly immaterial for the reason that the certificate from the Circuit Court of Appeals showed a state of facts that put this car on the same footing as any car

owned by the Railroad Company. For the facts certified showed that this Hammond Packing Company's car was used by the defendant Railroad Company in carrying the meats of the Packing Company throughout the United States, and that it was using this car the same as if it owned it, and it must necessarily have been responsible for the condition of this car to the same extent that it was responsible for the condition of a car absolutely owned by it.

WHEREFORE, for the foregoing reasons this plaintiff in error respectfully prays this Honorable Court to grant it a re-hearing of said cause.

FRANK T. RANSOM,
Attorney for Plaintiff in Error.

I, Frank T. Ransom, attorney and counsel for the plaintiff in error in the above entitled cause, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that same is not interposed for delay.

FRANK T. RANSOM.